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No. 80-1713

In The

Supreme Court of the United States

October Term, 1980

SHUTAO H. LIN, as Administrator of the Goods, Chattels and Credits which were of SHU REN LIN, M.D., Deceased; JOSEPH P. MALACYNSKI, as Administrator of the Estate of MICHELLE MALACYNSKI, and JOSEPH P. MALACYNSKI, individually; DONALD R. LYON and SOPHIE H. LYON; and JANE S. SHATKIN, as Executrix of the Estate of LLOYD J. SHATKIN, Deceased,

Petitioners,

vs.

AMERICAN AIRLINES, INC. and McDONNELL DOUGLAS CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRELIMINARY STATEMENT

This brief is submitted in reply to the briefs opposing the petition for certiorari to the United States Court of Appeals for

the Seventh Circuit. This reply brief will highlight certain inaccuracies in the opposing briefs which we think the Court should note in its consideration of the petition for certiorari.

ARGUMENT

I.

The respondents' briefs in opposition to certiorari are predicated upon inaccurate information and a misunderstanding of the rules of this Court.

We submit that the briefs submitted in opposition to the petition for writ of certiorari contain basic misinformation and are predicated upon a misunderstanding of the jurisdiction of this Court and of the applicable law.

While it is elementary that a review on writ of certiorari is not a matter of right but rather of judicial discretion, it is not by any means limited to those circumstances set forth in Rule 17 of the rules of this Court. Indeed, the Rule itself clearly and specifically recites that it does not purport to be all-inclusive or exhaustive in determining when the Supreme Court of the United States may grant certiorari.

The Supreme Court of the United States is the national and paramount expounder of federal law. All courts of this nation owe allegiance to this Court's decisions on federal issues. The object of this tribunal is to establish equal justice for all. This is accomplished mainly through the Court's power to review lower court judgments.

While it is true that the Supreme Court seeks to resolve conflicts among state courts or federal tribunals, it is also very urgently concerned about doing justice.

This Court has held:

> "Special and important reasons imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." [*Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614 (1955)].

It is also plain from the very language of Rule 17 that the fact that questions presented in a petition for certiorari do not snugly fit a category set forth in the Rule is not controlling. Thus, certiorari has been granted for reasons not enumerated in Rule 17. For example, the need for keeping in harmony with the Marine Insurance Laws of England, the question of whether there was a conflict between the lower federal court and the Queen's Bench, and the importance of the question may, at a particular time, warrant certiorari review [*see Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493, 44 S. Ct. 175 (1924)]. In the *Queen Ins. Co.* case, the Supreme Court said, *inter alia:*

> "There are special reasons for keeping in harmony with the Marine Insurance laws of England, the great field of this business." [*See Aetna Ins. Co. v. United Fruit Co.*, 304 U.S. 430, 434, 58 S. Ct. 959 (1938).]

In the *Aetna* case, the Supreme Court stated:

> "We granted certiorari . . . because of the admitted conflict of the decision below with that of the Court of Queen's Bench."

Thus, it is clear that the Supreme Court by no means regards Rule 17 as all-encompassing, and has indicated that it will depart from the categories enumerated therein when the equities of the particular case demand departure.

We submit that in the case at bar, such departure is clearly warranted.

Justice Harlan once remarked:

> "The cornerstone of a petition for certiorari in a federal case is a showing that the question to be reviewed is one of *general* importance." Harlan, *Manning the Dikes,* 13 Record of NYCBA 541, 551 (1958). [*See also,* Prettyman, *Opposing Certiorari in the United States Supreme Court,* 61 U. Va. L. Rev. 197, 207-208 (1975).]

II.

The choice of law analyses by the courts below were totally improper because they were arbitrary and capricious and deprived the litigants of equal protection of the laws.

Despite the fact that several states permit recovery of punitive damages in wrongful death actions, the choice of law determinations of the District Court in the case at bar totally preclude recovery by any plaintiff of punitive damages.

The determination of the District Judges who have been assigned this multi-district litigation that the law of a particular state shall apply has determined whether punitive damages may be recovered. In the case at bar, the court below has held the law of a state where no punitive damages are allowed to be controlling.

This clearly deprives petitioners of equal protection of the laws because if one applied the law of a punitive damages state, such as Texas, where one of the respondents now resides, punitive damages would be recoverable.

It appears very harsh to permit a determination of this magnitude to be made by two District Judges predicated upon sometimes fanciful and unrealistic logic.

In this precedent litigation, the issue seems to revolve around the question of whether the law of the current place of business of respondent American Airlines, Inc. is to be used or whether its purported place of business at the time of the alleged accident is to control. If the law of the current place of business (Texas) is applied then punitive damages are allowed. If the law of the place of business allegedly extant at the time the accident occurred is used, then punitive damages would seem to be precluded. But it is obvious that American Airlines, Inc. had already announced its *intention* to leave New York for Texas and had already embarked upon that move prior to the date that tragedy happened to strike.

The object of any determination should be the interests of justice and fairness. We submit that the plaintiffs in the District Court are entitled to punitive damages if under the concepts of applicable state law that right can be accorded. The State of Texas does provide that right and the principal place of business of respondent American Airlines, Inc. is the State of Texas at the time of this present litigation. We submit that it is totally illogical to apply the law of an irrelevant time and place so as to defeat legitimate claims for punitive damages which otherwise could be maintained.

Another disturbing aspect of the current litigation is that the state law chosen precludes recovery of punitive damages in wrongful death cases. But if death did not result, then punitive

damages would be recoverable. It is difficult to rationalize why a person who survives, perhaps severely injured and maimed, can maintain claims for punitive damages, but one who has suffered the extreme injury of death may do nothing of the sort. This appears to be an illogical rule, and deprives one set of litigants of the equal protection of the laws because it treats them unfairly vis a vis those of living citizens.

III.

Corporate giants who have clearly embarked upon irresponsible and dangerous courses of action are treated with virtual impunity if they cause the death of an individual and are made to suffer the exaction of punitive damages only if the victim of their irresponsibility manages to survive.

The respondents seem to lose sight of the fact that one of the main reasons for certiorari in this case is the totally illogical and senseless application of a set of rules pronounced by certain states, including New York, that victims of corporate or other irresponsibility may collect punitive damages only if they manage to survive. There is no rationale to that law and litigants who are victims of the same type of negligence are treated quite differently.

In *Pizzitz Dry Goods Co. v. Yelldale,* 276 U.S. 112, 47 S. Ct. 509 (1927) the Supreme Court made it clear that a state can properly use its wrongful death statute to encourage protection of the public. Our highest court proclaimed:

> ". . . we cannot say that it is beyond the power of the legislature . . . to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability."

As the law provides in New York State, it appears that far from making homicide expensive, if you kill someone you're lucky. If he survives, then and only then may you have to pay something punitive. There is absolutely no logic to this and we maintain that it is contrary to justice and common sense.

The state law held to be controlling in the case at bar does not allow recovery of punitive damages in wrongful death actions. Other states, which petitioners submit have greater interests in the pending litigation, do allow such recovery. Yet, virtually all states permit recovery of punitive damages when the victim of negligence survives. This is the injustice apparent herein, which petitioners believe constitutes a denial of equal protection of the laws.

It is time that our law provides that corporations which act in a wanton and reckless fashion be held in punitive damages for their actions. Equal justice means equal punishment for any guilty party. Corporations which would callously disregard the lives of others will act responsibly only when our present law is amended to permit punitive damages for wrongful death.

If a corporate officer were guilty of a pre-meditated murder, or of such reckless disregard for the consequences of his action that his conduct might be deemed murder under the so-called depraved heart doctrine of homicide, there would be little doubt that he'd face either life imprisonment or death depending upon the law of the particular state involved. No one can doubt that murder is punished with the most extreme punitive sanction that society can impose.

Yet, when gross negligence is involved, such as in the case at bar, less punishment is exacted when a hapless victim dies then when he survives. This is totally incongruous, illogical and unjust, and deprives the victim's heirs of equal protection under the laws.

IV.

Petitioners disagree with respondents' statement that there is no disagreement about the determinations of the District Court or the choice of law applied.

While respondents seem to believe that California, the place of manufacture of the plane, was the proper locale of choice of law in one instance, we submit that Missouri, the principal place of business of the plane's manufacturer, is just as logically a choice of law state. But even deeper than this question is the fact that in this multi-district litigation, it appears that the District Judges had unfettered discretion in determining which state law shall apply. The fact that the law of a state where no punitive damages are allowed was made to apply deprives litigants of significant relief. After all, it is only money that can be sought as redress for corporate improprieties and negligence.

It is crucial to this analysis to recognize that if separate lawsuits were permitted in any state where the corporate party could be found, the various litigants could choose their forum and bring the lawsuit in a state which permits punitive damages. Because this is multi-district litigation, the litigants are required to abide by the determination of the District Judges as to which state law shall apply.

This deprives litigants of the choice of law and foists it upon them. If one litigant is located in a state which prohibits punitive damages, a District Judge could apply the law of that state to the entire multi-district litigation. There do not appear to be any guidelines in this area imposed upon District Judges, other than some general platitudes which petitioners maintain have no logic behind them.

This Court should grant certiorari to once and for all establish that litigants who are killed are entitled to the same

protection as litigants who survive. In addition, this Court should determine that where it is possible to bring an action in a state which permits punitive damages, discretion should flow in favor of the highest award possible, rather than the lowest. If even one state where the corporation does business in any way, shape or form permits punitive damages, the law of that state should be applied.

An elementary aspect of jurisdiction is that a plaintiff can determine where he wants to sue a defendant. It is true that there must be some nexus with the forum where his suit is brought, but in the case at bar there would be no problem finding a nexus with virtually any state, since these are multi-state corporations.

CONCLUSION

Under the circumstances, we submit that the opposition briefs of the respondents lack merit and are not cogent. We again request that this Court grant certiorari.

Respectfully submitted,

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